

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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| Proceeding by the Department on its own Motion to Implement |) | |
| The Requirements of the Federal Communications Commission's |) | D.T.E. 03-60 |
| Triennial Review Order Regarding Switching for Mass Market |) | (Track A) |
| Customers |) | |

**MCI's OPPOSITION TO THE EXPEDITED MOTION OF VERIZON
MASSACHUSETTS TO STAY PROCEEDING**

Pursuant to the Hearing Officer's March 4, 2004 Memorandum, WorldCom, Inc. ("MCI") submits the following response in opposition to the Expedited Motion of Verizon Massachusetts to Stay Track A of This Proceeding, filed with the Department on March 3, 2004 and modified by letter to the Department dated March 10, 2004.¹ Verizon argues that the decision of the United States Court of Appeals for the District of Columbia Circuit in *United States Telecom Association v. Federal Communications Commission*, Case No. 00-1012, decided March 2, 2004 ("*USTA II*") vacating key provisions of the FCC's rules adopted in the *Triennial Review Order* ("*TRO*") warrants a stay of this proceeding for sixty days or until such time as the Department's role, if any, is determined by the FCC. For the reasons stated herein, Verizon's motion should be denied.

By its terms, *USTA II* does not prevent the Department from going forward with this proceeding. To the contrary, the Court has stayed enforcement of its order vacating portions of the *TRO* until a ruling on a motion for rehearing or rehearing en banc, or 60 days, whichever is **later**. Consequently, no mandate has issued from the Court of Appeals and *the TRO is still in effect*. It is likely to remain so because a majority of the FCC has announced its strong disagreement with the *USTA II* opinion, and has instructed the FCC's general counsel to seek a stay and to seek review in the Supreme Court of the United States. The FCC is strongly supported in this position by the National Association of Regulatory Utility Commissioners, and other parties, including MCI. FCC Commissioner Kevin Martin urged NARUC members to:

¹ Verizon is now proposing that the requested stay apply to both Tracks A and B of this proceeding and that the setting of individual hot cut rates be taken up in DTE 01-20 instead.

...continue this special partnership [with the FCC] and move forward with your best efforts to gather the critical factual data necessary for whatever lies ahead. Many of you have already made significant progress in developing the underlying factual record....,the relevant data and factual information you have and will gather as part of the competitive market analysis will be vital to advancing the cause of local competition in the next phase of the Commission's process.²

So long as the TRO continues to remain in effect, the only way to meet its time constraints is to proceed with hearings and briefing.

Even if *USTA II* were to survive appellate challenges from the FCC and other parties, it would still be critical that state commissions move forward with the state-specific investigatory and fact-finding role contemplated by the *TRO*. The D.C. Circuit did not make any finding of non-impairment with respect to any unbundled elements and did not direct the FCC to make any such findings. Nothing in the D.C. Circuit's ruling suggests that evidence of actual or potential deployment of facilities is irrelevant, or would be irrelevant under any standard to be adopted by the FCC on remand. Thus, were the Court's decision to take effect, the matter would be remanded to the FCC "for a re-examination of the issue." In that event, the FCC would need to base any further findings on granular, market-specific factual findings. For this reason, state commissions that gather the relevant facts within their jurisdictions would be able to provide important input to and thereby influence the FCC's ultimate findings. States will be able to play this critical role if and only if they have the information on market conditions and actual/potential deployment of facilities by CLECs within their jurisdictions. States that fail to move forward and develop an evidentiary record that they can share with the FCC will be rendered mute and irrelevant to any such FCC review.

USTA II recognizes both a fact-gathering and advisory role for state commissions. The Court noted that "there is some authority for the view that a federal agency may use an outside entity, such as a state agency or a private contractor, to provide the agency with factual

² Excerpt from speech of FCC Commissioner Kevin Martin to National Association of Regulatory Utility Commissioners ,Winter Meeting, March 8, 2004;

information,” *USTA II* at 16, concluding that “a federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decision itself.” *Id.* at 17. It was the decision-making role, not the fact-gathering or advisory roles of the state commissions that the D.C. Circuit found invalid. Were the D.C. Circuit’s mandate to issue, the FCC would need the states’ assistance to complete this task with any degree of granular accuracy. Moreover, having all or some of the evidence already collected and analyzed in a granular fashion at such time as the FCC proceeds with § 251 impairment determinations would materially speed the FCC’s completion of its massive task. There is obviously a compelling public interest in achieving a quick, clear and certain resolution to these controversies, to say nothing of the interests of the parties and their stakeholders. On the other hand, delaying fact gathering and analysis indefinitely until a final judgment is ultimately rendered in *USTA II* is not in anyone’s interest, particularly not in the public’s interest.

Based upon such considerations, the New York Public Service Commission has already decided to proceed with the hearings, notwithstanding the Court’s decision. The Commission’s Chairman stated that:

We will continue to be actively engaged in gathering relevant data and factual information as part of our analysis of the state of the competitive market in New York. At the end of the day, no matter who makes the ultimate decision - whether it is the FCC or the states - this factual data and analysis will be a critical component for our efforts to advance the competitive framework articulated by the FCC and the court.³

The Department should go forward to document current market conditions in Massachusetts and to explore and address the problems that would ensue from the elimination of UNE-P. The factual record compiled in this proceeding would shed considerable light on the nature of the wholesale market for UNE-P, UNE-L, and related network elements for the mass

³ Statement of William Flynn, chairman of the New York Public Service Commission, <http://www.dps.state.ny.us/fileroom/doc14477.pdf>.

market, and on the adverse consequences to consumers of granting Verizon's request to eliminate UNE-P in substantial parts of the Commonwealth. Of particular concern is the risk that Verizon might seek to exploit its monopoly power as the sole source of indispensable network elements by charging extortionate wholesale rates to CLECs.

Rather than sitting idle while the nine month clock continues to tick, the Department can and should move forward in this proceeding. The Department should move forward to identify and remove impairments to facilities-based residential competition by further developing the record in this proceeding. Then, in the event that the FCC requires new or additional information from the states, the Department will need only to supplement the work already done.

Accordingly, MCI respectfully requests that the Department deny Verizon's motion for a stay.

Respectfully submitted,

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